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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

STAHL LAW FIRM, Plaintiff and Appellant, v. APEX MEDICAL TECHNOLOGIES et al., Defendants and Respondents. _____ APEX MEDICAL TECHNOLOGIES et al., Cross-complainants and Respondents, v. STAHL LAW FIRM et al., Cross-defendants and Appellants.	D068929 (Super. Ct. No. 37-2010-00097839-CU-CO-CTL)

APPEAL from an order of the Superior Court of San Diego County, Katherine A. Bacal, Judge. Reversed in part, affirmed in part, dismissed in part.

Stahl Law Firm and Norbert Stahl, in pro. per. and for Plaintiff, Cross-defendants and Appellants.

Higgs, Fletcher & Mack, John Morris, Rachel E. Moffitt; Arthur A. Wellman, Jr., for Defendants, Cross-complainants and Respondents.

Stahl Law Firm (SLF) sued Apex Medical Technologies, Inc. (Apex), Zone Medical, LLC (Zone), Mark McGlothlin, Alice DePaul and Michael Marasco (together, Defendants) for $103,465.15 in legal fees and costs that Defendants allegedly owed SLF for having represented Defendants in a consolidated action in federal court. In an amended cross-complaint (cross-complaint), Apex, Zone and McGlothlin (together, Cross-complainants) sued SLF and Norbert Stahl (together, Stahl[1]) for professional negligence and breach of fiduciary duty based on legal services Stahl allegedly provided to Cross-complainants.

At trial, the jury awarded SLF nothing on the complaint, and the jury awarded Cross-complainants a total of $520,642 (Apex - $156,192.60; Zone - $52,064.20; McGlothlin - $312,385.20) on the breach of fiduciary duty claim in the cross-complaint. Based on the jury's verdict, the parties filed various motions.

As applicable to the issues Stahl raises in this appeal, the court ruled as follows on the parties' postverdict motions: Apex and Zone were entitled to a new trial on the issue of damages on their claim for breach of fiduciary duty in the cross-complaint; Stahl was not entitled to a judgment notwithstanding the verdict (JNOV) on Apex and Zone's claim

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1 The trial court ruled that Norbert Stahl solely owns Stahl Law Firm, and there is no legal distinction between them. No party challenges this ruling.

for breach of fiduciary duty in the cross-complaint; and, under Civil Code section 1717, Apex and Zone were entitled to recover from Stahl their attorney fees in defending the complaint.

As we explain, the trial court did not have jurisdiction to grant the partial new trial on damages to Apex and Zone or to deny the JNOV to Stahl; the denial of the JNOV by operation of law was not erroneous; and we lack jurisdiction to review Apex's and Zone's respective right to recover attorney fees. Accordingly, we reverse in part, affirm in part and dismiss in part.

I.

FACTUAL AND PROCEDURAL BACKGROUND

"As required by the rules of appellate procedure, we state the facts in the light most favorable to the [appealable orders]." (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 532, fn. 1.)

There are gaps in the presentation of what happened at trial, including in particular the evidence received at the trial that preceded the postverdict motions and the appeal. Stahl provided a two-volume appendix and the reporter's transcript from a July 2015 hearing on the parties' postverdict motions. We have disregarded factual statements in the briefs that do not contain accurate record references. (*McOwen v. Grossman* (2007) 153 Cal.App.4th 937, 947 ["Statements of fact that are not supported by references to the record are disregarded by the reviewing court."]; see Cal. Rules of Court, rule 8.204(a)(1)(C).)

To overcome the presumption of correctness that attaches to the trial court's orders on appeal, Stahl (as the appellant) "has the burden of showing reversible error by an adequate record."[2] (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.)

A. *Stahl Is Retained as Legal Counsel*

In the fall of 2007, Apex and Zone retained SLF to provide legal services, the scope of which was described as follows in a written retainer agreement: "[SLF] will represent [Apex and Zone] with respect to intellectual property matters.[3] The matters currently known are (1) patent prosecution related to catheter technology; (2) consulting related to patent litigation against I-Flow Corporation." If the scope of the engagement was ever formally expanded in writing — either in terms of the clients or the matters — the parties have not advised us.

That said, Stahl (along with other attorneys) was counsel of record and appeared on behalf of *all Defendants* in litigation in the United States District Court for the Southern District of California, *I-Flow Corp. v. Apex Medical Technologies, Inc*., case No. 3:07-CV-01200-DMS-NLS (*I-Flow* litigation). The jury in the *I-Flow* litigation awarded the plaintiff more than $6.8 million against Apex, more than $93,000 against Zone and more than $4.9 million against McGlothlin. We do not know when Stahl first

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2 As a result of the presumption of correctness that attaches to the order on appeal and the burden on Stahl to establish reversible error, Stahl's repeated suggestions in his reply brief that Defendants conceded issues by not responding to arguments raised in his opening brief does not, by itself, mean that Stahl's argument is correct or that Stahl is entitled to relief on appeal.

3 At the trial in the current case, Mr. Stahl testified that Apex, Zone *and McGlothlin* retained Stahl.

appeared in the *I-Flow* litigation on Defendants' behalf, but the record indicates that after the federal jury returned its verdict in the second phase of the trial (i.e., punitive damages), the district court filed an order allowing Stahl to withdraw as counsel of record on November 4, 2009.

B. *The Underlying Lawsuit Goes to Trial*

In February 2010, SLF filed the underlying lawsuit. SLF claimed damages of $103,456.15 in unpaid invoices from all Defendants "for services in connection with the [*I-Flow* litigation], comprising fees for services and costs incurred." The causes of action included breach of contract, breach of the implied covenant of good faith and fair dealing, quantum meruit, open book account and account stated.

In October 2010, Cross-complainants (which are three of the five Defendants) filed the cross-complaint. They alleged causes of action for professional negligence and breach of fiduciary duty. In part, Cross-complainants alleged:

> "5. By means of the above-mentioned [retainer] agreement, [Stahl] represented to Cross-[c]omplainants that their interests would be served in a professional and competent manner. [Stahl] owed a duty to provide competent, legal services in the handling of Cross-[c]omplainants' legal matters.
>
> "6. In performing professional services for Cross-[c]omplainants, [Stahl] had the duty to have and exercise that degree of learning and skill ordinarily possessed by ethical and reputable attorneys practicing in the same locality and under similar circumstances.
>
> "7. Based on the attorney client relationship, [Stahl] owed a fiduciary duty to Cross-complainants to adequately and professionally handle their legal matters. This duty arises under the common law of the State of California, as well as the Statutes of the State of California and Rules of Professional Conduct established by the State of California. [¶] . . . [¶]

> "12. Despite having voluntarily accepted the trust and confidence of Cross-[c]omplainant[s] with regard to the above-referenced actions, [Stahl] abused the trust and confidence of [Cross-complainants] by conduct which includes, but is not limited to the following: Placing [Stahl's] financial interests ahead of the [Cross-complainants'] legal and financial interests[.] Upon information and belief, Cross[-c]omplainants allege that fees charged by [Stahl] were excessive, unreasonable or not consistent with the actual time devoted to Cross[-c]omplainants['] representation in the [*I-Flow* litigation]; [Stahl] abandoned Cross[-c]omplainants at the most critical stage of the case although [Stahl] was still an attorney of record on the case[.]
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> "13. As a result of [Stahl's] above-referenced breach of fiduciary duties [Cross-complainants] have been damaged in a sum not yet ascertained, plus interest."

The underlying lawsuit was tried before a jury in April and May 2015.[4] In a 10-page, 34-question special verdict, on May 8, 2015, the jury awarded SLF nothing on the complaint and awarded Cross-complainants a total of $520,642 (Apex - $156,192.60; Zone - $52,064.20; McGlothlin - $312,385.20) on the breach of fiduciary duty claim in the cross-complaint.

C. *The Court Rules on the Parties' Postverdict Motions*

In June 2015, Stahl filed motions for: (1) clarification of the verdict to interpret the verdict as Stahl suggested; (2) a JNOV as to the jury's finding of damages against Stahl on the cross-complaint; (3) a new trial on the issue of damages to McGlothlin on the cross-complaint, in the event the court did not interpret the verdict as suggested by Stahl; and (4) a stay of enforcement of the judgment if the court did not interpret the

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4 The record on appeal contains the clerk's minutes from 11 days during the April 21 through May 8, 2015 time period. The April 21 minutes indicate that the case had already been in trial long enough to have selected a jury and replaced at least one juror, although opening statements had not yet been made. The May 8 minutes indicate that the jury verdict had been received and filed.

verdict and grant a JNOV as requested by Stahl. In June 2015, Defendants filed a motion for an award of attorney fees incurred in defending SLF's complaint based on an attorney fee provision in SLF's retainer agreement; and Cross-complainants filed a motion for an equitable order, pursuant to the jury's finding that Stahl had breached a fiduciary duty, that Stahl disgorge all fees Cross-complainants paid Stahl in the *I-Flow* litigation.

The parties filed written opposition to their adversaries' motions and replies to their adversaries' oppositions.

In mid-July, the court presided over a hearing on the parties' motions, and on August 26, 2015, the court issued a minute order (August 2015 Order), ruling in part as follows: (1) Apex and Zone were entitled to a new trial as to damages on their claim for breach of fiduciary duty in the cross-complaint;[5] (2) Stahl was not entitled to a JNOV on the issue of damages in Apex and Zone's claim for breach of fiduciary duty in the cross-complaint; (3) Stahl was entitled to a JNOV on McGlothlin's claim for breach of fiduciary duty;[6] and (4) under Civil Code section 1717, Apex and Zone were entitled to recover from Stahl their attorney fees in defending the complaint.

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5 The court "deem[ed]" Cross-complainants' motion for disgorgement to be a motion for new trial as to the issue of damages on the claim for breach of fiduciary duty and granted the new trial as to Apex and Zone only. The third cross-complainant, McGlothlin, was not included in the new trial order, because, during the postverdict proceedings, the court also granted Stahl's motion for JNOV as to McGlothlin's claim for breach of fiduciary duty.

6 The parties raise no issues in this appeal as to this ruling. The grant of a JNOV is not an appealable order; the appeal, if any, is from the judgment that is eventually entered. (*Walton v. Magno* (1994) 25 Cal.App.4th 1237, 1239-1240.) Nonetheless, the

Stahl timely appealed from the August 2015 Order.

II.

DISCUSSION

Stahl maintains first that the superior court lacked jurisdiction to order the new trial on the issue of damages to Apex and Zone on their claim for breach of fiduciary duty. Next, Stahl argues that the court erred in denying Stahl's motion for JNOV as to damages on Apex and Zone's claim for breach of fiduciary duty in the cross-complaint.[7] Finally, Stahl contends that the court erred in awarding Apex and Zone attorney fees. As we explain, we agree with Stahl on the first issue, disagree with Stahl on the second issue and do not reach the third issue because we lack jurisdiction.

A. *The Superior Court Lacked Jurisdiction to Grant a New Trial*

Cross-complainants filed their motion for disgorgement — which the trial court "deem[ed]" a motion for new trial as to damages on the Cross-complainants' claim for

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ruling is affected by the disposition of this appeal for reasons explained at part II.B.2.b., *post*.

[7] In the trial court, Stahl requested a JNOV "on *the jury's findings* of damages under the cross-claim for breach of fiduciary duty by [Cross-complainants]." (Italics added.) Consistently, in his opening brief, Stahl asks that this court affirm certain *findings* of the jury, reverse certain *findings* of the jury, and change certain *findings* of the jury. Our research has not disclosed any basis on which this court has the authority to affirm, reverse or change jury findings, and Stahl has not offered any in the context of a motion for a JNOV. In general, we review appealable orders and judgments of the superior court, and the jury's verdict is neither an order nor a judgment. Accordingly, the issue we are considering on appeal is whether Stahl was entitled to a JNOV on Cross-complainants' claim for breach of fiduciary duty on the basis that Cross-complainants did not prove damages — a necessary element to the cause of action for breach of fiduciary duty against an attorney (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 182). (See pt. II.B., *post*.)

breach of fiduciary duty — on June 16, 2015. Stahl filed his motion for a new trial (as to damages on McGlothlin's claims for breach of fiduciary duty) on June 17, 2015. The court granted a partial new trial motion (as to damages on Apex and Zone's claim for breach of fiduciary duty only) *more than 60 days later* on August 26, 2015. The court erred for at least two reasons.

First, there is no authority that allows a trial court to "deem" a postverdict equitable motion for disgorgement to be a motion for a new trial. To the contrary, absent exceptional circumstances not present here (see 3 Wegner, et al., Cal. Practice Guide: Civil Trial and Evidence (The Rutter Group 2016) ¶¶ 18:240-18:248, pp. 18-65 to 18-67), "the trial court cannot grant a new trial on its own motion" (*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919). Rather, "[t]he power of the trial court to grant a new trial may be exercised only by following the statutory procedure and is conditioned upon the timely filing of a motion for new trial, the court being without power to order a new trial *sua sponte*." (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 899; see Code Civ. Proc.,[8] § 657 [new trial may be granted "on the application of the party aggrieved"].)

Second, even if the potential for a new trial had properly been before the court, the court issued its ruling at a time when it no longer had jurisdiction to grant a new trial. As applicable to the present case, section 660 provides in relevant part:

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8 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

> "[T]he power of the court to rule on a motion for a new trial shall expire . . . 60 days after filing of the first notice of intention to move for a new trial. If such motion is not determined within said period of 60 days, . . . the effect shall be a denial of the motion without further order of the court."[9]

The effect of section 660 to an order that appears to grant a new trial more than 60 days after the filing of the first notice of intention to move for a new trial has been well-settled by our Supreme Court for almost a half century: "The time limits of section 660 are *mandatory and jurisdictional*, and an order made after the 60-day period purporting to rule on a motion for new trial is *in excess of the court's jurisdiction and void*." (*Siegal v. Superior Court* (1968) 68 Cal.2d 97, 101 (*Siegal*), quoted in *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 64, and *Maroney v. Iacobsohn* (2015) 237 Cal.App.4th 473, 485, fn. 11.) In short, based on the dates the postverdict motions were filed in this case, the court no longer had jurisdiction to order a new trial (as it attempted) on August 26, 2015, and the part of the August 2015 Order that attempted to do so is void.

Accordingly, we reverse that portion of the August 2015 Order purporting to grant a new trial as to damages on Apex and Zone's claim for breach of fiduciary duty.

B. *Stahl Did Not Meet His Burden of Establishing Error in the Denial of a JNOV on Cross-complainants' Claim for Breach of Fiduciary Duty*

Stahl argues that he was entitled to a JNOV on the breach of fiduciary duty claim. We disagree.

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9 Events other than the "filing of the first notice of intention to move for a new trial" can trigger the commencement of the 60-day time period, but those other events are based on the entry of a judgment (§ 660) — which did not happen in this case prior to the filing of the postverdict motions.

1. *Law*

As applicable here, "on motion of a party against whom a verdict has been rendered, [the trial court] shall render judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made." (§ 629.)

On appeal, we review the motion for JNOV de novo. (*Linear Technology Corp. v. Tokyo Electron, Ltd.* (2011) 200 Cal.App.4th 1527, 1532.) " 'A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support.' [Citations.] On appeal from the denial of a motion for judgment notwithstanding the verdict, we determine whether there is any substantial evidence, contradicted or uncontradicted, supporting the jury's verdict. [Citations.] If there is, we must affirm the denial of the motion." (*Jorge v. Culinary Institute of America* (2016) 3 Cal.App.5th 382, 396 (*Jorge*).)

In part II.A., *ante*, we concluded that the trial court's order purporting to grant a new trial was void, because the court issued its ruling more than 60 days after the first notice of intention to move for a new trial. (See § 660; *Siegal, supra,* 68 Cal.2d at p. 101.) Notably, this same rule applies to Stahl's motion for JNOV: "The power of the court to rule on a motion for judgment notwithstanding the verdict shall not extend beyond the last date upon which it has the power to rule on a motion for a new trial. If a motion for judgment notwithstanding the verdict is not determined before that date, *the effect shall be a denial of that motion without further order of the court*." (§ 629,

subd. (b), italics added; see *Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1271 (*Palmer*) [citing § 629, subd. (b), trial court has jurisdiction to rule on a motion for JNOV for 60 days].)

2. *Analysis*

Initially, we note that Stahl's motion for JNOV was denied by operation of law prior to the August 2015 Order. (§ 629, subd. (b); *Palmer*, *supra*, 30 Cal.4th at p. 1271.) Thus, like the court's grant of a partial new trial, that portion of the August 2015 Order purporting to grant a JNOV as to McGlothlin's claim for breach of fiduciary duty is in excess of the court's jurisdiction, having already had been denied by operation of law. (§ 629, subd. (b); *Palmer*, *supra*, 30 Cal.4th at p. 1271; see § 660; *Siegal*, *supra*, 68 Cal.2d at p. 101.) Accordingly, based on the trial court's lack of jurisdiction, we will reverse that portion of the August 2015 Order that purports to grant a JNOV.[10]

In his appellate briefing, Stahl does not acknowledge the *denial* (by operation of law) of his motion as to McGlothlin, although he appears to have known of it based on his notices of appeal.[11] Further, in the "Relief Requested" portion of his opening brief,

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10 The merits of a motion denied by operation of law due to the expiration of the 60-day time period in section 660 may be reviewed on appeal in the same manner as if the trial court timely denied the motion by order. (*In re Marriage of Liu* (1987) 197 Cal.App.3d 143, 152 [new trial motion].) In addition, section 629, subdivision (c) expressly provides for appellate review of the denial of a motion for a JNOV — without differentiating between a denial by timely written order and a denial by operation of law.

11 Stahl filed an initial notice of appeal on August 18, 2015 — which was more than 60 days *after* the first notice of intention to move for a new trial (and eight days *before* the August 2015 Order that granted the JNOV as to McGlothlin's claim for breach of fiduciary duty). In that notice, Stahl stated that he is appealing from the "[d]enial of

Stahl argues for a reversal of the denial of the JNOV as to *Apex and Zone only*. Nonetheless, we cannot say that Stahl forfeited appellate review of the denial by operation of law, because in the "Argument" portion of his brief, Stahl contests the denial of a JNOV to Apex, Zone *and McGlothlin.* Accordingly, in our consideration of the issues, we will include the denial of the JNOV as to McGlothlin.

In his opening brief, Stahl argues that he is entitled to a JNOV on Cross-complainants' claim for breach of fiduciary duty as follows: "Here, the Jury found damages to Apex, Zone and McGlothlin under their cross-claim for breach of fiduciary duty in question 33 of the Verdict . . . . In view of the Jury's findings in the Verdict, *the evidence*, and [Cross-complainants'] failure to prove *any* harm caused by any breach of fiduciary duty by Stahl, the damages to Apex, Zone and McGlothlin should be held to be $0." (First italics added.)

In a typical appeal from the denial of a motion for a JNOV, we review the record on appeal for substantial evidence. (*Jorge*, *supra*, 3 Cal.App.5th at p. 396.) Thus, the issue in this appeal is whether the record contains any substantial evidence of damages that resulted from Stahl's breach of his fiduciary duty.

Where (as here) the appellant does not provide a reporter's transcript of the trial, "the [verdict] must be *conclusively presumed correct* as to *all evidentiary matters.*" (*In re Estate of Fain* (1999) 75 Cal.App.4th 973, 992 (*Fain*).) That is because we must

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motion for JNOV *by operation of law for failure to decide*," citing sections 629, subdivision (b) and 660. (Italics added.) Then, on September 14, 2015, *after* receiving the August 2015 Order, Stahl filed both an abandonment of his initial appeal and a new notice of appeal that identified the August 2015 Order as the basis of the appeal.

"presume[] that the unreported trial testimony would demonstrate the absence of error." (*Ibid*.) In reply to this argument by Cross-complainants, Stahl has refined the statement from his opening brief (quoted two paragraphs above), assuring us that he is relying on only "the Verdict, the Superior Court's nonsuit orders, the Cross-Complaint of Apex, Zone and McGlothlin, and *the other parts of the record before this Court*." (Italics added.)

Stahl's position (that Cross-complainants failed to prove damages resulting from Stahl's breach of fiduciary duty) is based on the following analysis: (1) the only damages Cross-complainants suffered were based on the outcome of the *I-Flow* litigation; and (2) Cross-complainants are not entitled to such damages because they did not present a trial within a trial. However, Stahl did not establish either contention.

In support of his argument that the only damages Cross-complainants suffered were based on the outcome of the *I-Flow* litigation, Stahl begins his analysis by relying on the pleadings and the evidence in the record on appeal. In particular, he quotes from four paragraphs from the cross-complaint, relying on those allegations as a limitation on the damages Cross-complainants suffered as a result of Stahl's breach of fiduciary duty.[12] (Stahl then references two trial exhibits that he contends limited the evidence of

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12 Elsewhere in his brief, Stahl attempts to explain the damages Cross-complainants claimed by quoting from and providing a record reference to Cross-complainants' posttrial written argument, not to evidence (or to argument made to the jury). While we accept that Cross-complainants made that argument, we do not infer that the jury was presented with only those two options. Without a complete record, we cannot determine the scope, or evidence in support, of Cross-complainants' damages.

damages at trial.)[13] However, on May 5, 2015 (which was at least the eighth day of trial), the minutes establish that the court granted Cross-complainants' motion to amend their claim for breach of fiduciary duty *to conform to proof*.[14] Without a reporter's transcript, we do not know the extent of the amendment or the evidence on which the amendment was based. Since we "presume[] that the unreported trial testimony would demonstrate the absence of error" (*Fain, supra*, 75 Cal.App.4th at p. 992), we presume the unreported trial testimony would establish that Cross-complainants' damages for breach of fiduciary duty arose from a source *other than* the outcome of the *I-Flow* litigation.[15] With that presumption, regardless of Stahl's presentation on appeal, the

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13 Although Stahl included in his appendix copies of nine documents with trial exhibit labels, Stahl does not tell us which, if any, were introduced into evidence. Indeed, in Stahl's appendix, one of the exhibits is stamped "Offered," without any indication whether it was admitted into evidence. Also, at one point in his brief Stahl relies on a set of documents that he says was merely "marked" as a trial exhibit. Nonetheless, we will assume that the exhibits in Stahl's appendix were in fact admitted into evidence, because such assumption does not change the outcome on any of the substantive issues.

14 In his briefing, Stahl does not mention the motion, the amendment or the evidence in support of the amendment.

Cross-complainants' opposition to Stahl's postverdict motions in the trial court suggests that the amendment and evidence exceeded the allegations of the cross-complaint and evidence on which Stahl relies in this appeal: "*As proof at trial showed*, and as [C]ross-complainants were permitted to *amend their cross-complaint to proof at trial* [*to*] *show*[], Stahl entered into his representation by breaching his fiduciary duties (even after solicitation involving more breaches), and continually breached his fiduciary duties in very fundamental ways throughout the litigation." (Italics added.)

15 We also presume that Cross-complainants' damages for breach of fiduciary duty arose from a source *other than* an overpayment to Stahl for fees. (*Fain, supra*, 75 Cal.App.4th at p. 992.)

special verdict is supported by substantial evidence in all regards as to all Cross-complainants. (*Ibid.*)

Even without that presumption, we disagree with Stahl's suggestion that Cross-complainants were required to prove their damages by way of a trial within a trial. The trial-within-a-trial approach is " 'an objective approach to decide what *should have been the result* in the underlying proceeding or matter.' " (*Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1531 (*Ambriz*).) As applicable here, Stahl argues that in order to have proven damages from the breach of fiduciary duty, Cross-complainants were required to establish that without the breach the results of the *I-Flow* litigation would have been more favorable to Cross-complainants (with the measure of damages the difference between the actual result and the result of retrial of the *I-Flow* litigation within the breach of fiduciary duty trial).

However, the trial within a trial is a method for proving *causation*, not damages. (*Ambriz, supra*, 146 Cal.App.4th at p. 1531; *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1240, fn. 4 [phrases like " 'trial within a trial' . . . describe *methods of proving causation*" (italics added)]; see *Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 544 ["carrying *the burden on causation* is relatively straightforward and comprehensible for the jury, even if it necessitates a 'trial within a trial' " (italics added)].) Notably, Stahl's motion requested a JNOV based only on insufficient evidence of damages — not of causation — on Cross-complainants' claim for breach of fiduciary duty. Thus, Stahl has no basis on which to

contend that Cross-complainants were *required* to prove the amount of their damages by presenting a trial within a trial.[16]

Stahl's authorities do not require a different result. Stahl tells us that *Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518 (*Slovensky*) "relied on a trial-within-a-trial analysis for alleged damages from the outcome of an underlying litigation." We disagree. Admittedly, the Court of Appeal was concerned with the plaintiff's ability "to prove damages to a legal certainty" based on the defendant attorney allegedly obtaining an inadequate settlement in the underlying matter. (*Id.* at p. 1528.) However, to do this, the court reasoned, the plaintiff "must prove that, *if not for the* [*attorney's breach of duty*], she would certainly have received more money in settlement or at trial" (*ibid.*, italics added); i.e., to prove the certainty of her damages, the plaintiff was required to establish causation. The italicized language speaks to causation, *not* to damages. Likewise, *Loube v. Loube* (1998) 64 Cal.App.4th 421 dealt with causation, not damages. In an introductory paragraph, the Court of Appeal summarized the issue as follows: "[I]t is not enough to show that the defendant breached a duty owed to the client; the client also must demonstrate that *the breach of that duty caused actual loss or damages*." (*Id.* at p. 425, italics added.) Finally, despite his argument, Stahl's quotation from *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 confirms that the case dealt with *causation*, not

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16 We are not saying that a claimant is precluded from establishing damages by way of presenting a trial within a trial; but there is no *requirement* for Cross-complainants to have proved *damages* in this method. Since causation is not an issue on appeal, we express no opinion as to whether Cross-complainants here were required to establish *causation* by way of a trial within a trial.

damages. (*Id.* at p. 48 [defendant legal clinic's breach of fiduciary duty "was not *a cause* of any injury to [plaintiff]" (italics added)].)

For the foregoing reasons, Stahl did not establish either that Cross-complainants suffered damages only based on the outcome of the *I-Flow* litigation or that Cross-complainants did not establish damages by failing to have presented a trial within a trial. We now turn to some additional arguments Stahl raises that do not apply to all three Cross-complainants — two are applicable only to Apex and Zone, and two are applicable only to McGlothlin.

a. *Apex and Zone*

In support of the contention that Cross-complainants' damages for breach of fiduciary duty are necessarily based on the outcome of the *I-Flow* litigation, Stahl relies on certain portions of the special verdict. Stahl argues that the only way to reconcile the findings in the verdict — in particular, the answers to questions 30, 33 and 34, italicized below — is to award Cross-complainants nothing on their cross-complaint.

To understand Stahl's argument and to interpret the special verdict such that it is not ambiguous as we must (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092), we set forth the following portions of the special verdict:

"**BREACH OF CONTRACT**

"Stahl v. Apex and Zone

"1. Did [SLF] and [Apex] and/or [Stahl] enter into a contract?

"Yes √ No _____"

"**BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**

"**Stahl v. Apex and Zone**

"7. Did [SLF] and [Apex] and/or [Stahl] enter into a contract?

"Yes √ No _____"

"**COMMON COUNT: GOOD AND SERVICES RENDERED**

"**Stahl v. Apex, Zone, McGlothlin, DePaul, and Marasco**

"13. Did any of the Defendants below request, by words or conduct, that [SLF] perform services for their benefit?

"[Apex]	Yes √	No _____
"[Zone]	Yes √	No _____
"[McGlothlin]	Yes _____	No √
"Alice DePaul	Yes _____	No √
"Michael Marasco	Yes _____	No √ "

"**COMMON COUNT: OPEN BOOK ACCOUNT**

"**Stahl v. Apex, Zone, McGlothlin, DePaul, and Marasco**

"18. Did any of the Defendants below and [SLF] have financial transactions?

"[Apex]	Yes √	No _____
"[Zone]	Yes √	No _____
"[McGlothlin]	Yes _____	No √
"Alice DePaul	Yes _____	No √
"Michael Marasco	Yes _____	No √ "

"**COMMON COUNT: ACCOUNT STATED**

"**Stahl v. Apex, Zone, McGlothlin, DePaul, and Marasco**

"23. . . . . [¶] . . . [¶]

"***AFFIRMATIVE DEFENSE***

"***SET OFF***

"**Stahl v. Apex and Zone**

"28. Did any of the Defendants below pay more on the paid invoices than the reasonable value of the services rendered by [SLF] as billed on those invoices

"[Apex]	Yes √	No _____
"[Zone]	Yes √	No _____

"For each Defendant where your answer is [*sic*] to question 28 is 'yes,' answer question 29. . . .

"29. Were the overpayments a substantial factor in causing harm to any of the Defendants below?

"[Apex]	Yes √	No _____
"[Zone]	Yes √	No _____

"For each Defendant where your answer is [*sic*] to question 29 is 'yes,' answer question 30. . . .

"*30. What are each Defendants'* [sic] *damages due to those overpayments?*

"[*Apex*]	*Yes $0*	*No* _____
"[*Zone*]	*Yes $0*	*No* _____

"Please answer question 31.

"**CROSS-COMPLAINT AND AFFIRMATIVE DEFENSE**

"BREACH OF FIDUCIARY DUTY

"**. . . Apex, Zone, and McGlothlin v. Stahl**

"31. Did Norbert Stahl breach one (or more) of the following duties of an attorney:

"a) the duty of utmost candor;
"b) the duty to use reasonable care; and/or
"c) the duty not to place his own interests above those of his client.

"Answer as to each Cross-Complainant:

"[Apex]	Yes √	No _____
"[Zone]	Yes √	No _____
"[McGlothlin]	Yes √	No _____

"For each Cross-Complainant where your answer is [*sic*] to question 31 is 'yes,' answer question 32. . . .

"32. Was Norbert Stahl's breach(es) a substantial factor in causing harm to any of the Cross-Complainants below?

"[Apex]	Yes √	No _____
"[Zone]	Yes √	No _____
"[McGlothlin]	Yes √	No _____

"For each Cross-Complainant where your answer is [*sic*] to question 32 is 'yes,' answer question 33. . . .

"*33. What are each of Cross-Complainants' damages?*

"[*Apex*]	*$ 156,192.60*
"[*Zone*]	*$ 52,064.20*
"[*McGlothlin*]	*$ 312,385.20*

"If you entered an amount greater than zero for either one or both of [Apex] and/or [Zone], please answer question 34. . . .

"*34. For each Cross-Complainant for which you entered an amount greater than zero, are the damages you awarded in response to*

question 33, if any, in addition to the damages you found, if any, in response to question 30?

"[*Apex*] *Yes* _____ *No* ___√___
"[*Zone*] *Yes* _____ *No* ___√___

"Signed: . . . ." (Italics added.)

In support of his position, Stahl reasons as follows: by its answer to question 30, the jury found that Apex and Zone were entitled to $0 (as a setoff to SLF's claim for fees on the complaint) as "damages" for overpayments; by its answer to question 33, the jury found that Apex and Zone together were entitled to $208,256.80 as "damages" on their cross-complaint for Stahl's breach of fiduciary duty; and by its answer to question 34, the jury found that the $208,256.80 in "damages" for breach of fiduciary duty was *not* in addition to the $0 in "damages" as a setoff to SLF's claim for fees. Stahl's argument continues: Because the $208,256.80 in "damages" for breach of fiduciary duty was (1) necessarily for attorney fees, and (2) *not* in addition to the $0 in "damages" as a setoff of SLF's claim for fees, the jury found that the damages to Apex and Zone were $0. If Stahl cannot establish either of these premises, his argument fails; in fact, he cannot establish both.

First, as we concluded at part II.B.2., *ante*, without a full record, Stahl has not met his burden of establishing that Apex's and Zone's respective damages for breach of fiduciary duty are necessarily limited to attorney fees Apex and Zone paid Stahl.

Second, the jury's finding that Apex and Zone were entitled to $0 in "damages" as a setoff to Stahl's complaint for fees does *not* mean that some component (or all) of

Apex's and Zone's damages for breach of fiduciary duty was based on the attorney fees Apex and Zone had paid Stahl. The jury's answers to questions 28 and 29 established that Apex and Zone "pa[id] more on the paid invoices [from SLF] than the reasonable value of the services rendered by [SLF] as billed on those invoices" and that "the overpayments [were] a substantial factor in causing harm" to Apex and Zone. Although the jury found in answer to question 30 that Apex's and Zone's "damages due to those overpayments" were $0, in question 30 the jury was not asked to determine "damages" as that term is generally understood.[17] As we explain, based on the form of the special verdict and the law of the affirmative defense of setoff, the jury properly determined that, since it did not award SLF anything on any of the claims in its complaint for attorney fees, there was no award from which to offset the overpayments that caused Apex and Zone harm.

Question 30 is found on page 8 of the special verdict, which is set up in the following format:

"BREACH OF CONTRACT
"Stahl v. Apex and Zone
"[Questions 1-6]

"BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING
"Stahl v. Apex and Zone
"[Questions 7-12]

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17 "Every person who suffers detriment from the unlawful act or omission of another, *may recover from the person in fault* a compensation therefor in money, which is called damages." (Civ. Code, § 3281, italics added.)

"COMMON COUNT: GOODS AND SERVICES RENDERED
"Stahl v. Apex, Zone, McGlothlin, DePaul, and Marasco
"[Questions 13-17]

"COMMON COUNT: OPEN BOOK ACCOUNT
"Stahl v. Apex, Zone, McGlothlin, DePaul, and Marasco
"[Questions 18-22]

"COMMON COUNT: ACCOUNT STATED
"Stahl v. Apex, Zone, McGlothlin, DePaul, and Marasco
"[Questions 23-27]

"*AFFIRMATIVE DEFENSE*
"*SET OFF*
"*Stahl v. Apex and Zone*
"[Questions 28-30]

"*CROSS-COMPLAINT AND AFFIRMATIVE DEFENSE*
"*BREACH OF FIDUCIARY DUTY*
"*. . . Apex, Zone, & McGlothlin v. Stahl*
"[Questions 31-34]"

(Italics added; bolding and underscoring omitted.) Question 30 dealt only with an affirmative defense to the claims SLF asserted in its complaint. By its placement in the special verdict form, question 30 did not require a determination of *Civil Code section 3281 damages* (see fn. 17, *ante*) that Apex or Zone could recover from Stahl; nor could the jury's answer to question 30 be interpreted as an award of such damages, because *damages to the defendant* cannot result from the affirmative defense of setoff as a matter of law. The right to a setoff is based on the following equitable principle: When parties in litigation hold cross-demands for money, one should be applied against the other and the plaintiff may recover the balance due, if any. (See *Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 744.) Relief by way of a setoff is limited to reducing or defeating a plaintiff's claim; a defendant may not obtain affirmative relief against a

plaintiff based on the affirmative defense of setoff. (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 195; see *id.* at p. 194 [Court of Appeal erroneously concluded that affirmative defense of setoff "could possibly result in an award of damages against [the plaintiff]"].) Having first found that Stahl was not entitled to a recovery on his complaint, the jury properly found Apex and Zone were not entitled to a setoff.

Stahl's final argument as to Apex and Zone is that Apex and Zone were not entitled to disgorgement of the fees that they previously paid to SLF. Disgorgement is "a remedy, rather than an element of a cause of action." (*Slovensky*, *supra*, 142 Cal.App.4th at p. 1522.) There is no need to reach this issue, since there is no ruling of the trial court granting disgorgement (but only a sua sponte ruling on a new trial), and we decide actual controversies rather than render advisory opinions. (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170 (*Pacific Legal Foundation*) ["The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory opinions."]; *Stonehouse Homes v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 540 (*Stonehouse Homes*).) In any event, the basis of Stahl's contention that Apex and Zone were not entitled to this remedy is — once again — that Apex and Zone failed to prove any damages: (1) Apex and Zone were not entitled to damages based on the attorney fees they had paid SLF, since the jury found that Apex and Zone incurred $0 in "damages" due to overpayments of fees (question 30); and (2) Apex and Zone were not entitled to damages based on the outcome of the *I-Flow* litigation, since Apex and Zone did not present a trial within a trial. We concluded in the

immediately preceding paragraph that the jury's response to question 30 was not a finding that Apex's and Zone's damages did not include attorney fees Apex and Zone had previously paid SLF; and we concluded at part II.B.2., *ante*, that Apex and Zone were not required to establish the amount of damages by presenting a trial within a trial.

For these reasons, Stahl did not meet his burden of establishing that Apex and Stahl (as opposed to all three Cross-complainants) failed to prove damages.

b. *McGlothlin*

Stahl's initial argument as to McGlothlin is that because the jury found McGlothlin did not request services that SLF perform for his benefit in question 13 of the special verdict,[18] Stahl did not have a fiduciary duty to McGlothlin. Notably, Stahl does not present any legal authority for his position. Moreover, the record fully supports the existence of an attorney-client relationship between Stahl and McGlothlin: (1) the docket in the *I-Flow* litigation expressly lists SLF as counsel for McGlothlin;[19] and (2) Stahl testified at trial that McGlothlin retained him. The existence of an attorney-client relationship between SLF and McGlothlin, of course, results in Stahl's fiduciary duty to McGlothlin. (*Bradner v. Vasquez* (1954) 43 Cal.2d 147, 155 ["the relationship of attorney and client, when established, becomes fiduciary in character"]; *Palmer v.*

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18 Contrary to Stahl's statements in his opening brief, the jury was not asked whether McGlothlin *retained* SLF, but only whether he "request[ed], by words or conduct, that [SLF] perform services for [his] benefit."

19 If, for example, SLF provided legal services to McGlothlin (the president of both Apex and Zone) at the request of either Apex or Zone (both of which were SLF's clients according to the retainer agreement), then an attorney-client relationship would have existed between Stahl and McGlothlin, irrespective of the jury's answer to question 13.

Superior Court (2014) 231 Cal.App.4th 1214, 1233 [" 'Few precepts are more firmly entrenched than the fiduciary nature of the attorney-client relationship, which must be of the highest character.' "].)

Stahl's second argument as to McGlothlin is that because the jury found McGlothlin had no financial transactions with SLF in question 18 of the special verdict, he did not overpay Stahl and, accordingly, he has no claim for disgorgement. Once again, there is no need to reach this issue, since there is no ruling of the trial court granting disgorgement, and we decide actual controversies rather than render advisory opinions. (*Pacific Legal Foundation*, *supra*, 33 Cal.3d at p. 170; *Stonehouse Homes*, *supra*, 167 Cal.App.4th at p. 540.) In any event, even if Stahl is correct (and we express no opinion), a finding that McGlothlin had no financial transactions with SLF does not mean (or imply) that McGlothlin did not suffer damages and, thus, does not establish error in the denial of Stahl's motion for a JNOV.

c. *Conclusion*

For the foregoing reasons, Stahl did not meet his burden of establishing that the denial of his motion for a JNOV as to Cross-complainants' claim for breach of fiduciary duty (on the basis that Cross-complainants did not prove damages) is erroneous.

C. *Appellate Jurisdiction Is Lacking for Review of the Ruling on Attorney Fees*

Stahl contends that the trial court erred in ruling that Apex and Zone are entitled to recover the attorney fees they incurred in defending SLF's complaint. Because the motion that resulted in the order was filed postverdict and because the record on appeal does not contain a judgment, we asked the parties for supplemental briefing on the issue

whether the Court of Appeal had jurisdiction to review that portion of the August 2015 order awarding fees.

A party's right to appeal is conferred by statute, generally by section 904.1 in unlimited civil cases.[20] (*Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5; *Garau v. Torrance Unified School Dist*. (2006) 137 Cal.App.4th 192, 198 ["unless specified by statute no judgment or order is appealable"].) Section 904.1, subdivision (a)(1) effectively codifies the common law "one final judgment rule" in that an appeal lies only from a final judgment that terminates the trial court proceedings by completely disposing of the matter in controversy. (*Griset v. Fair Political Practices Com*. (2001) 25 Cal.4th 688, 697.)

Acknowledging that the trial court's order granting Apex and Zone an entitlement to attorney fees is not a final judgment, Stahl contends that we have jurisdiction to review the ruling under "the collateral order doctrine." Although the collateral order doctrine is a recognized exception to the one final judgment rule, it does not apply in this instance.

An interim judgment or order is directly appealable as a "collateral" order when the following three elements are present: (1) the order is final as to the collateral matter; (2) the subject of order is in fact collateral to the general subject of the litigation; and (3) the order directs the payment of money by the appellant or the performance of an act by or against the appellant. (*Sjoberg v. Hastorf* (1948) 33 Cal.2d 116, 119 (*Sjoberg*);

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20 "An appeal, other than in a limited civil case, may be taken from any of the following: (1) From a judgment, except (A) an interlocutory judgment, other than as provided in paragraphs [not applicable here]." (§ 904.1, subd. (a).)

Apex LLC v. Korusfood.com (2013) 222 Cal.App.4th 1010, 1016.) The court's order granting Apex and Zone an entitlement to attorney fees from Stahl fails to comply with at least two of these requirements.

First, an interim order is not "final" if further judicial action is required on the matter dealt with by the order. (*Koshak v. Malek* (2011) 200 Cal.App.4th 1540, 1545 (*Koshak*).) Here, further judicial action is required on this matter, since the court did not determine the amount of the fees.[21]

Second, to be "collateral" for purposes of an interlocutory appeal, an interim order must direct the payment of money or performance of an act.[22] (*Sjoberg, supra*, 33 Cal.2d at p. 119; *Bauguess v. Paine* (1978) 22 Cal.3d 626, 634, fn. 3; *Koshak, supra*, 200 Cal.App.4th at p. 1545.) Here, the trial court's order does not direct either the payment of money by Stahl or the performance of act by or against Stahl.

Finally, the only authority cited by Stahl in support of his position, *Smith v. Smith* (2012) 208 Cal.App.4th 1074, is inapplicable. In *Smith*, the Court of Appeal held that an order to redact confidential documents in a contested custody proceeding was appealable

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21 In addition, at the time the court ruled, the court contemplated a new trial as to Apex's and Zone's damages on the cross-complaint, which, depending on the outcome, may have affected the determination of the prevailing party. With the disposition of this appeal, that occurrence is no longer a possibility. (See pt. II.A., *ante*.)

22 We acknowledge a minority view that does not require the payment of money or performance of an act before a party can appeal from such an order under the collateral order doctrine. (1 Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2016) ¶ 2:79, pp. 2-55 to 2-57.) However, our Supreme Court could not have been more clear in *Sjoberg*: to be appealable under the collateral order doctrine, the interim order "*must* direct the payment of money by appellant or the performance of an act by or against him." (*Sjoberg*, *supra*, 33 Cal.2d at p. 119, italics added.)

as a collateral order. (*Id.* at p. 1083.) Unlike the order here, which awarded Apex and Zone a yet to be determined amount of attorney fees, the family court's order in *Smith* "is appealable because it directs the performance of an act — namely redaction of the reports — that is final and not subject to further resolution in future proceedings." (*Id.* at p. 1084.)

For these reasons, the order awarding Apex and Zone the attorney fees they incurred in defending SLF's complaint is not an appealable order. Accordingly, we dismiss Stahl's appeal from that portion of the August 2015 Order that awards Apex and Zone attorney fees.[23]

DISPOSITION

That portion of the August 2015 Order that purports to grant a partial new trial on damages to Apex and Zone on their cross-complaint is reversed. That portion of the August 2015 Order that purports to grant Stahl a JNOV on McGlothlin's claim for breach of fiduciary duty in the cross-complaint is reversed. The denial by operation of law of Stahl's motion for a JNOV is affirmed. Stahl's appeal from that portion of the August 2015 Order allowing Apex and Zone to recover their attorney fees is dismissed.

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23 In so doing, we express no opinion as to the merits of the court's order.

Apex, Zone and McGlothlin are awarded their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3).)

IRION, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.